Fred Lewis Carpets, Inc. *and* **International Brotherhood of Painters and Allied Trades, Painters Union Local No. 294, AFL-CIO.** Case 32-CA-3044

March 11, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On August 4, 1981, Administrative Law Judge Burton Litvack issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,[1] as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that the Respondent, Fred Lewis Carpets, Inc., Fresno, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing the discharge of employees because they engaged in union or other protected concerted activities.

(b) Threatening to close the business for unspecified periods of time because employees engaged in union or other protected concerted activities.

(c) Warning employees that it would never go union, in order to induce them to believe that union activities are futile.

(d) Threatening employees that it would become bankrupt as a consequence of their choosing a union as their collective-bargaining representative.

(e) Inviting union supporters to work elsewhere and warning employees that union activities and continued employment are incompatible.

(f) Impliedly promising economic and other benefits to employees in order to induce them to forgo union activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer employees William Schweizer and Robert Bartram immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of wages they may have suffered by reason of their discharges, in the manner described in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Fresno, California, office copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Re-

[1] We note, in reference to the Administrative Law Judge's statement in sec. I, par. 2, of his Decision, that the Board has held a bargaining order appropriate absent a finding of union majority status. Subsequent to his Decision, on remand from the U.S. Court of Appeals for the Third Circuit, the Board in *United Dairy Farmers Cooperative Association*, 257 NLRB 772 (1981), issued a bargaining order in the absence of a card majority. Member Fanning adheres to his position, as set forth in the original Decision and Order in *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), that the Board possesses the authority to issue a nonmajority bargaining order. He does not, however, find the circumstances in this case warrant such an order. Member Zimmerman, who participated in the Supplemental Decision in *United Dairy*, recognized the Third Circuit's decision as binding on the Board only for purposes of deciding that case. In the instant case, he and Chairman Van de Water find it unnecessary to determine whether the Board has authority to impose a nonmajority bargaining order since they would not in any event grant such an order here.

Chairman Van de Water has serious reservations that employees Schweizer and Bartram were constructively discharged on the facts set forth by the Administrative Law Judge and is adopting such findings solely because of the absence of exceptions thereto.

[2] We shall modify the Administrative Law Judge's recommended Order to correct certain inadvertent errors and omissions therein.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employees and requests that a bargaining order remedy be issued herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT cause the discharge of employees because they engaged in union or other protected concerted activities.

WE WILL NOT threaten to close the business for unspecified periods of time because employees engaged in union or other protected concerted activities.

WE WILL NOT warn employees that we will never go union, in order to induce them to believe that union activities are futile.

WE WILL NOT threaten employees that we would become bankrupt as a consequence of their choosing a union as their collective-bargaining representative.

WE WILL NOT invite union supporters to work elsewhere and warn employees that union activities and continued employment are incompatible.

WE WILL NOT impliedly promise economic and other benefits to employees in order to induce them to forgo union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer William Schweizer and Robert Bartram immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of wages they may have suffered as a result of our discrimination against them, with interest.

FRED LEWIS CARPETS, INC.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge: This matter was heard before me in Fresno, California, on February 24, 1981. On October 16, 1980,[1] the Regional Director for Region 32 of the National Labor Relations Board, herein called the Board, issued a complaint, based upon original and first amended unfair labor practice charges filed on September 5 and October 14, respectively, by International Brotherhood of Printers and Allied Trades, Painters Union Local No. 294, AFL-CIO, herein called the Union, alleging that Fred Lewis Carpets, Inc., herein called Respondent, engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, and requesting, as a remedy for the aforementioned allegations, that a bargaining order should issue. Respondent filed an answer, denying the commission of any unfair labor practices. All parties have been afforded full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs, which have been carefully examined. Based upon the entire record, the post-hearing briefs, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, with an office and principal place of business in Fresno, California, is engaged in the nonretail installation of carpeting. During the 12-month period immediately preceding the issuance of the complaint, which period is representative, Respondent received in excess of $50,000 for services provided to A & M Carpets, a California corporation engaged in the retail sale of carpets. A & M Carpets purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California. Based upon the foregoing stipulation of the parties and the record as a whole, I find that Re-

[1] Unless otherwise stated, all dates herein occurred in 1980.

spondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The record establishes that the Union is an organization in which employees participate and which bargains collectively with employers concerning wages, rates of pay, hours of work, and other terms and conditions of employment and processes grievances on behalf of employees. Respondent does not contest, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

1. On or about August 28 did Respondent violate Section 8(a)(1) and (3) of the Act by causing the termination of employees William Schweizer and Robert Bartram?

2. On or about August 28 did Respondent violate Section 8(a)(1) of the Act by the following acts and conduct:

(a) Informing its employees that selection of a union to represent them would be futile by stating that it would never accept a union.

(b) Threatening to close the business for 3 weeks because of the employees' union activities.

(c) Threatening to terminate employees by informing those employees who desired union representation that they could work out of the union hall.

(d) Impliedly promising benefits to employees in lieu of union representation.

(e) Interrogating employees regarding their union sympathies.

3. Assuming the commission of unfair labor practices, should a bargaining order remedy be issued, ordering Respondent to recognize and bargain with the Union?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent is engaged in the nonretail installation of carpet in Fresno, California, performing said work for retail carpet dealers in the Fresno area. Fred Lewis is the owner of Respondent and the supervisor in charge of all installation work.[2] Henry Webber is the vice president, and an individual named George Noroian is the secretary-treasurer of the corporation. Webber's title appears to be a nominal one inasmuch as he works full time as an installer and was given his title by Lewis "because you have to have a vice president of a corporation."[3] Respondent employs a work force consisting of carpet layer/installers and helpers. Its principal account is A & M Carpets, the chief operating officer of which is Morris Horwitz.

William Schweizer, who was employed by Respondent from December 17, 1977, until August 28 as a carpet layer/installer,[4] stated that on August 21 he and three other employees of Respondent decided to seek representation from the Union. According to Schweizer, prior to that date Henry Scharnick, a union business representative, had appeared at different jobs, on which Respondent's employees were working, and had questioned the workers about their wages and fringe benefits. On August 21, Scharnick spoke to the employees on a jobsite and invited them to come to the union hall so that they could "listen to what the Union had to offer." Accordingly, later that day, employees Schweizer, Robert Bartram, Larry Neyman, and Mark Juarez arrived at the Union's office and spoke briefly to Scharnick; however, as he was unable to answer their questions satisfactorily, Scharnick scheduled a meeting for August 25 for the employees to speak to the Union's attorney. On Monday, August 25, the four employees returned to the union hall; spoke to the Union's attorney, Barry Bennett; and affixed their signatures to a sheet of paper, indicating their desire that the Union represent them for purposes of collective bargaining.[5] The next day, employee Larry

[2] Respondent admits that Lewis is a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent within the meaning of Sec. 2(13) of the Act.

[3] Counsel for the General Counsel, in his post-hearing brief, conceded that Webber is an employee and a member of the bargaining unit herein.

[4] It is clear that Respondent never contended that Schweizer was a supervisor within the meaning of Sec. 2(11) of the Act or even considered that he was such until, in response to a cross-examination question concerning who is "in charge" while he is gone, Fred Lewis testified, "Bill Schweizer was." This response opened a Pandora's box of testimony from Lewis and engendered substantial argument in the post-hearing briefs. Respondent's arguments regarding the nature of Schweizer's supervisory status were summarized in the following testimony of Lewis: "[Schweizer] could route the men, he could tell them where to go, he could call them, disburse them. He could do anything that I could."

When more closely examined, Lewis offered the following specifics regarding Schweizer's alleged supervisory status. Initially, the latter was placed in charge by Respondent because Lewis ordinarily operates several jobs concurrently and cannot spend an inordinate amount of time at any one location. While Schweizer was, thus, in charge approximately 200 times a year, these occasions never lasted more than 1 day in duration, and Schweizer would visit daily to check on how the jobs progressed. If Lewis was scheduled to be away more than a day, the secretary-treasurer was assigned to monitor the work. As to Schweizer's authority and responsibility when in charge, Lewis testified that the former could not hire, fire, or write checks. Further, while Schweizer did have authority to give employees permission to leave early, any job instructions he gave were in strict accord with instructions given to him previously by Lewis and, if job problems arose, Schweizer was required to notify Lewis and had no independent authority to rectify them. Also, the work of Respondent's employees appears to have been of a rather routine nature (". . . I think everybody was pretty well capable unless he was just a green kid"), and Schweizer spent at least 80 percent of his time installing carpet. Finally, while he was one of two employees who was given a company truck and unlimited gasoline, Schweizer's wages and other fringe benefits were no greater than other employees.

From the foregoing, it is clear that, when in charge, Schweizer acted merely as a conduit for Respondent's instructions, spent almost all his working time installing carpet, was not authorized to independently resolve work-related problems, and, as the work was routine in nature, did not use discretion in assigning work. In these circumstances, noting that such was not raised until late in the hearing, it cannot be said that Schweizer's authority was that of a supervisor within the meaning of Sec. 2(11) of the Act. *Judd Valve Co., Inc.*, 248 NLRB 112 (1980); *Unimedia Corporation*, 235 NLRB 1561 (1978); *Ferland Management Company*, 233 NLRB 467 (1977); *Local Union No. 915, International Brotherhood of Electrical Workers, AFL–CIO (Borrell-Bigby Electrical Company, Inc.)*, 225 NLRB 317 (1976); *Highland Telephone Cooperative, Inc.*, 192 NLRB 1057 (1971).

[5] As will be explained later, I do not deem it necessary to recount what specifically was said at this meeting. I have assumed *arguendo* that each employee indicated his desire to be represented by the Union for purposes of collective bargaining.

Toney, accompanied by Schweizer, went to the union hall and also placed his signature on a similar sheet of paper.

It was the normal practice of Fred Lewis to meet his employees at a restaurant near the A & M Carpets facility and discuss that day's assignments. On Thursday, August 28, at approximately 7 a.m., Bartram and Schweizer were already seated at a table in the Olive Branch restaurant when Neyman and Juarez arrived—followed shortly by Fred Lewis. Unaccountably, Lewis sat at the counter, while Neyman and Juarez joined the two other employees. After a few moments, Bartram beckoned Lewis to join them, and the latter did so. According to Schweizer, "[Bartram] told him that he knew it was about the union activities so we might as well just discuss it and get it out in the open." Lewis replied, ". . . I'm not going to go Union," and "he said if we really wanted to go to the Union, you'd have to go out and burn trucks to let the nonunion workers know that you mean business." Lewis continued, asserting that he was too old to fight the Union; that going union would cause Respondent to become "bankrupt"; and that he would "try it" only if Henry Scharnick guaranteed that Respondent would make money. The employees individually responded that they had nothing against Lewis personally but that they viewed the Union as a different approach to bettering themselves. Lewis said that he understood. The meeting lasted approximately 1 hour; as it ended, Lewis told the employees to meet him at the A & M Carpets building at 2:30 p.m.

Averring that "my memory ain't too good," Fred Lewis testified to a different account of this meeting. According to Lewis, Bartram asked him to join the others at a table and surprised Lewis, saying, "[W]e'd just as well get this off our chest. We went to a union meeting . . . and we'd like to have a union in here." Lewis replied that he did not know but that he did not "think it's feasible but we'll see." They proceeded to discuss unions with Lewis saying that he had once belonged to a union but that he did not think a union was feasible for Fresno as there were at least 100 nonunion carpet layers in the area. Denying that he ever uttered the word bankruptcy, Lewis agreed that he might have mentioned the burning of trucks. Lewis also admitted saying that, if Scharnick would guarantee that Respondent could make money, "I could see it would be feasible but there's no guarantee." To this, according to Lewis, the employees replied that they could not understand why a union would not work. Lewis concluded, testifying that he made no reply but merely directed the employees to go to their work assignments.

Employees Neyman and Juarez, both of whom testified on behalf of Respondent, contributed significantly less detailed and more conclusionary versions of the Olive Branch meeting. Neyman testified that the entire conversation lasted 45 minutes and that Bartram began: "[He] . . . told Fred that we had a meeting and that they would like to see the Union start up. . . . Bobby asked different questions on seeing if Fred would go for it or what he felt about it . . . we talked about what we were told about the Union." Lewis replied that he would have liked to have gone to the union meeting with the employees, that it would be impossible to bid union wages and receive work, but that he would be willing to discuss the matter further with the employees. Both Bartram and Schweizer stated that they wanted the Union "For the money," and, according to Neyman, "I said that I . . . more or less . . . liked the benefits of it." Neyman corroborated Lewis that the latter did not mention bankruptcy but also contradicted him, stating that Lewis said nothing about the burning of trucks.

Mark Juarez recalled that the meeting lasted just 20 minutes and that, at first, the participants were silent. Finally, Bartram mentioned the Union, telling Lewis that "we wanted to get into the Union." Lewis replied that "he had been in the Union before and it didn't work before . . . he'd wished he would have been there during our meeting with the Union. He could have told his side of the story . . . but we didn't give him a chance." Echoing Neyman, Juarez corroborated but later contradicted Lewis, testifying that the latter said nothing about either bankruptcy or the burning of trucks. According to Juarez, despite having previously gone to two union meetings and ostensibly indicating receptivity to the benefits of union representation and despite the brevity of the Olive Branch meeting, he decided after the conversation that he no longer wished to support the Union. Asked during cross-examination why he changed his mind, Juarez testified, "Well, Fred had told us things through his experience about the Union and . . . he wished he could have been there at our meeting . . . so he could tell his side. . . ." Asked further to specify what Lewis might have said, Juarez answered that Lewis explained that "ten years ago he'd been with the Union and it just didn't work because there was a lot of scabs in Fresno who would do the job for a lot cheaper than what the Union wages would be." Finally, when asked to clarify his testimony on this point, Juarez said, ". . . I can't recall everything . . . you know I wasn't planning on remembering everything he said."

Pursuant to Lewis' request, Respondent's employees gathered at the A & M Carpets building at approximately 3 p.m. that day. Lewis ushered the employees into a conference room, and everyone sat around a conference table. The employees present were Schweizer, Bartram, Neyman, Juarez, Ron Giovanetti, Henry Webber, and perhaps Ken Schram. Schweizer testified that Lewis shut the door "and he said, he's been thinking about what we'd told him this morning all day long and he figured the best thing to do was shut the shop down in three weeks and have Jim Dutcher [an A & M Carpets salesman] just quit bidding the work. And that way we could all cool down or just let everything blow by." Next "He said there was no way [Morris Horwitz] would go Union." Lewis continued, saying that he was sorry that the employees did not trust him enough to invite him to go with them to the Union hall so that they "could have heard his side on the Union matter and could have heard the [Union's] side and those people that wanted to stay with the Union could work out of the Union hall, and those that elected to go with Fred Lewis could go with Fred Lewis." Schweizer asked why Lewis felt that the Union would not work, "and he said there's no way its

going to happen. He's just going to go bankrupt if he tries to go union. There's no way he can make the money." At that point Henry Webber spoke in Lewis' behalf, opining that Lewis did not earn enough to pay union wage rates. Schweizer spoke again, raising the subject of fringe benefits and saying that with a family to support, such would mean a lot to him. Lewis responded "that if it was just benefits they could have discussed them." Schweizer replied that they had discussed the subject for 2 years but nothing had ever been accomplished. Bartram kept asking why Lewis believed Respondent could not go union—Lewis replied that "he'd go bankrupt if he did but he wasn't going to do it. He [was not] going to do it. He [was not] going to go Union." To that, Juarez said that he told Lewis his opinion that morning and that "he was behind Fred all the way." Neyman also spoke up, saying "that he didn't want to bankrupt [Lewis] so he'd stick by his side." At that point, according to Schweizer, Lewis "asked each one of us what our feel about it was, what our grounds were." Schweizer, who was seated closest to Lewis, replied, "Well, I guess I'd better hit the road." Ron Giovanetti, who was sitting next to Schweizer, said that he would stay with Lewis. Neyman and Juarez followed, each saying that he would stay with Respondent. Bartram was next, and he said, "I guess I'll hit the road with Willie. . . . $7.00 an hour is pretty hard to live on. . . . I was making more money in '75 [due to the cost of living]." Lewis responded to Bartram that he had just given the employees a $1 per hour raise, that such was his limit this year, and that maybe he would give a similar raise the next year.

With Lewis' response to Bartram, the meeting ended. Both Bartram and Schweizer went outside and unloaded their equipment from Respondent's truck. They then went back inside the building and encountered Fred Lewis near the building coffee area. According to Schweizer, Lewis "said he was very unhappy that we didn't counsel him first on the matter. He said he'd done a lot for me when I first started out in the company as far as I had a brand new baby girl, helped me get my house, he said he was hurt by it. He told us if we did want our jobs back we could have them." Schweizer replied, "[T]here's really no way I can do it. I've got to go down the road because I feel like I'm just spinning my wheels here. I'm not advancing myself." Bartram then once again asked if Lewis would try the union. As during the employee meeting, Lewis responded, ". . . no . . . Absolutely not." The employees thereupon left the building.

During cross-examination while maintaining that the following occurred "about the middle of the meeting" and denying that Lewis asked what the employees thought of it, Schweizer admitted that Lewis told the assembled employees "that Morris had asked him previously since . . . a few of us had just got a dollar an hour raise, that if this was going to happen often, because he was concerned about if we were going to keep asking for more raises or what. He said Morris was out of town . . . and he would talk to him . . . and consult . . . about the matter that was at hand." Also, Schweizer became contradictory regarding the question that precipitated his announced intention to quit. Thus, he testified that Lewis "asked how our feelings on the matter was," and denied that Lewis said anything about "grounds"—"To me, it was the same thing."

While corroborating Schweizer on at least one significant point, Lewis testified to a substantially different version of this meeting. On direct examination, he said that he began the meeting by asking, ". . . what's the problem." Bartram answered by asking why Lewis felt the Union would not work, and, "I explained to him I don't think it's feasible. . . . How can I pay you twice as much when I only get the operating capital to pay you $7 an hour? . . . I said . . . if you want insurance you should've brought that up to me . . . ." No employee responded,[6] and, according to Lewis, he next "told them . . . if you guys want to go Union, let's don't hurt A & M. . . . [L]et me tell them how it is, take the price list and see if [Horwitz will] go for it." At that point, Lewis states, he "asked them what they thought about it." Schweizer abruptly responded by saying he quit, and "I went all around the table and they—it just automatically went around the table, I didn't force it around, it just went around the table . . . then it went to [Bartram] and he said I quit and it went around the table."[7] Finally, Lewis specifically denied talking about bankruptcy, going out of business, or shutting down the business but failed to deny any other aspect of Schweizer's testimony regarding this meeting.

Under cross-examination by counsel for the General Counsel, Lewis initially denied having any further conversation with either Schweizer or Bartram regarding their job status. He also denied that either individual said that he could not continue working because of low wages and benefits. Later during cross-examination, Lewis contradicted himself, stating that he did speak to the two employees in the coffeeroom. While denying that either employee offered an explanation for quitting, Lewis stated, "I told them I hate for you to leave. You've got a job here anytime," and the employees just responded that "it wasn't feasible." However, a moment later Lewis again altered his testimony, "I said . . . I don't know why you guys quit and they said . . . we just don't want to work for this wage no more."

Larry Neyman related a rather limited version of this meeting. "Fred started out the meeting and asked you know, what we wanted to do about this [and] . . . he wanted to hear . . . what they had to say about it. Most of the talking was done between [Schweizer and Bartram] saying they felt that they could go union and bid the Union prices and get jobs." Lewis responded that "he would like Morris to get involved in the meeting . . . so we could talk with Morris about it and he asked

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[6] Later during his direct examination, Lewis contradicted himself, testifying that Schweizer did, indeed, respond that they had previously been discussing benefits.

[7] Notwithstanding that the answers were in no way responsive to his question, Lewis denied either that he mentioned this to the employees or that anyone asked him what he (Lewis) meant by his question. According to Lewis, "I was startled . . . [Y]ou ask a question and you ask what you think about it, you know I was going to give them each . . . [a chance] . . . to tell me what they thought about it and . . . a guy says he quits—I mean, evidently, he ain't getting the meaning of what I meant."

how we felt about it." Lewis turned to Schweizer and the latter "said . . . what would be the use of talking to Morris if we couldn't do it . . . and he said that he'd quit." Schram and Juarez then responded, each saying he would stay with Respondent. Bartram was next, ". . . and Bobby said that he would have to find another job." Giovanetti then announced that he was staying. Finally, it was Neyman's turn. "I sat there and I had to think for a minute. I thought you know, hey, what's going on here? Why is everybody quitting or staying? This wasn't what it was about. I told him I was staying but I didn't understand why everybody was quitting as the question had nothing to do with that."[8] Neyman denied that Lewis mentioned bankruptcy or that Lewis said he would tell Dutcher to stop taking job orders.

Mark Juarez testified that the meeting in the A & M Carpets conference room lasted between 30 and 45 minutes, but that he could not recall how it began. He did remember that everyone began speaking "about wages and this and that, you know, or saying about going union or the benefits or this and that, you know." According to Juarez, "I remember at one point I said about how the benefits, you know. I said can't we have benefits, you know? And [Lewis] goes . . . that's not it. Everybody doesn't want just the benefits they want all this money stuff and he goes. . . . I'll give the price list to Morris and see what happens." Then, Lewis asked "what does everybody think" and went around the circle of employees. Schweizer responded that he was going to quit and that he was going to have to find another job; thereupon, "everybody just from what Willie had said, everybody just went right behind so well, this and this, I'll do this and I won't do this."[9] Juarez denied that Lewis spoke about bankruptcy or about shutting down the job. However, Juarez did corroborate Schweizer that Lewis, indeed, stated that those who wanted to belong to the Union could work out of the union hall, while those who did not should remain with him.

B. *Analysis*

Apparently conceding in his post-hearing brief that nothing uttered by Fred Lewis during his breakfast meeting with employees Schweizer, Bartram, Neyman, and Juarez at the Olive Branch coffeeshop on August 28 arose to the level of a violation of Section 8(a)(1) of the Act,[10] counsel for the General Counsel argues that during his afternoon meeting with Respondent's employees in the A & M Carpets conference room, Lewis violated Section 8(a)(1) of the Act by threatening employees with a temporary closure and discharge because of their union activities, by promising health insurance and other benefits in order to induce them to withdraw their support for the Union, and by interrogating employees with regard to their union sympathies. In addition, he argues, by said conduct Respondent caused employees Schweizer and Bartram to quit their employment—thus, constructively discharging them in violation of Section 8(a)(1) and (3) of the Act. Contrary to counsel for the General Counsel, Respondent argues that no constructive discharge can be found herein inasmuch as continued employment was never specifically conditioned upon either Schweizer or Bartram relinquishing any rights guaranteed by Section 7 of the Act and as their working conditions were never changed to their respective detriments. Further, counsel for Respondent argues that both Schweizer and Bartram quit Respondent's employ for economic reasons. Finally, he asserts that nothing said by Lewis to Respondent's employees on August 28 constituted violations of Section 8(a)(1) of the Act.

Initially, I note that the substantive divergence between the testimony of Schweizer and that of Lewis, Neyman, and Juarez regarding the afternoon meeting concerns mainly the tone thereof. Thus, crediting Schweizer, the meeting involved essentially the expounding by Fred Lewis of rather blatant and threatening antiunion sentiments; while crediting Respondent's witnesses, Lewis mostly expressed his economic concerns about union representation. I am convinced, upon careful observance of the demeanor of the witnesses and close scrutiny of the entire record that, except for one particular circumstance, Schweizer's version of the afternoon meeting—and, indeed, the events of the entire day—is the more accurate and warrants crediting. In this regard, I particularly note that employee Juarez corroborated Schweizer's uncontroverted testimony that Lewis, in effect, invited the union supporters to leave and threatened that union activities and continued employment were incompatible. Such clearly supports the conclusion that Lewis' intent and tone during the afternoon meeting in the A & M Carpets conference room were coercive and unlawful in nature. In addition, I found Fred Lewis to be contradictory as to the post-meeting conversation with Schweizer and Bartram and generally unimpressive and less than candid as a witness, and, except for one aspect of his testimony, I do not credit him herein. Likewise, except where corroborative of Schweizer and one aspect of their testimony, I thought Neyman and Juarez were most unpersuasive witnesses, who gave rather sketchy and opaque versions of the events herein, and I also do not credit them.

Based on the credited testimony herein, I believe that, during his conversation with employees Schweizer, Bartram, Neyman, and Juarez at the Olive Branch coffeeshop during the early morning of August 28, Fred Lewis was surprised and undoubtedly shocked to learn that the

[8] Neyman testified that he responded as he did "because I was just confused . . . I couldn't understand why everybody was going through this. . . . It was very confusing."

[9] As with Neyman, Juarez was surprised by the responses as he did not think Lewis' intent was to see if employees desired to quit or stay—he was just inquiring as to what employees thought about his submitting the union price list to Horwitz.

[10] Par. 6(a) of the complaint specifies that during the morning meeting Lewis *repeatedly* told employees that Respondent would not accept a union. While such language was used, the record does not establish repeated usage. I presume that counsel for the General Counsel's apparent concession that no violation occurred goes to that. In any event, I shall accept his concession and make no findings in that regard as to the morning meeting. However, as will become evident, such repeated emphasis that Respondent would not accept a union was stated by Lewis at the *afternoon* meeting, as well as other palpably unlawful statements, which were not alleged as such in the complaint. Accordingly, as such was fully litigated at the hearing I have made findings on *all* statements which I regard as unlawful at the afternoon meeting.

employees had recently sought union representation, and he reacted with warnings that Respondent would never go union and that doing so would bankrupt him. I further believe, based on the credited testimony, that Lewis repeated and expanded upon these themes with coercive and threatening rhetoric during the afternoon meeting with Respondent's employees in the A & M Carpets conference room. Thus, I conclude that Lewis began the meeting with a blatant threat—he was going to close down the business in 3 weeks and have the A & M Carpets salesman stop bidding upon jobs, permitting everything to "blow by." Also, asked several times by either Schweizer or Bartram, who were the main employee union proponents during the meeting, whether Respondent would voluntarily work with the Union, Lewis repeatedly replied that Respondent would never go union and, without offering a scintilla of supporting evidence for his prediction, that to do so would bankrupt him. Next, adding emphasis to his "gloom and doom" language, Lewis stated his annoyance over not being permitted to be at the union hall when the employees spoke to union representatives; he announced that those people who wanted to stay with the Union could work out of the union hall, while those who elected to stay with Fred Lewis could do so. Then, as admitted by Lewis, he informed Schweizer that if the latter was dissatisfied with the lack of employee benefits, including health insurance, he (Schweizer) could have come to Lewis, and they could have discussed the matter. Finally, after several employees, obviously persuaded by Lewis' baseless predictions and threats, announced—like sycophants—that they had no desire to bankrupt Respondent and, in effect, renounced the Union, Lewis "threw a bone" to the remaining union adherents (obviously Schweizer and Bartram), stating that he would undertake the useless act of taking a union-based price list to Morris Horwitz and ascertain whether the latter, who, Lewis had earlier stated, would also never go union, could operate under the higher costs.[11] Then Lewis asked what the employees thought about it.[12] To that, Schweizer unexpectedly stated his intention to quit. One by one, notwithstanding the nature of the question, other employees followed along, announcing their desire to remain with Respondent, while Bartram echoed Schweizer, saying he also was going to quit.

There can be no doubt that the entire course of Lewis' remarks that afternoon was calculated to dissuade Respondent's undecided employees from supporting the union movement and to cause apprehension among the union adherents for their job security. More specifically, Lewis' stated intention to close the business for an unspecified period in 3 weeks in order to permit everything to "blow by" could have only been perceived by his listeners as a blatant threat to shut down because of the employees' union activities. This must be so inasmuch as Lewis prefaced the threat by commenting that he had been thinking about what had been discussed that morning—the Union. Such a threat of business closure has traditionally been found to be violative of Section 8(a)(1) of the Act. *Jim Baker Trucking Company*, 241 NLRB 121 (1979); *Local Union No. 707, Highway and Local Motor Freight Drivers, Dockers and Helpers, Claremont Polychemical Corporation*, 196 NLRB 613 (1972). Additionally, by constantly reminding the employees that Respondent would never go union, Lewis inculcated in his employees a sense of futility about the exercise of free choice in selecting a representative for collective bargaining and thereby violated Section 8(a)(1) of the Act. *Unimedia Corporation, supra, El Rancho Market*, 235 NLRB 468, 472 (1978). Next, the credited evidence establishes that Lewis repeated several times that Respondent would become bankrupt if forced to pay union wages and benefits, but that in making such "predictions," he never offered to the employees any supporting figures or other evidence necessary to establish that the consequences of which he spoke were beyond his control. Absent such a factual basis, the Board law is clear that Lewis' "prediction" of bankruptcy constituted nothing more than a veiled threat to close the business if employees selected the Union as their collective-bargaining representative. *El Rancho Market, supra; The Terminal Taxi Company, d/b/a Yellow Cab Co.*, 229 NLRB 643 (1977); *Swift Textiles, Inc.*, 214 NLRB 36 (1974); *Marathon Le Tourneau Company, Gulf Marine Division of Marathon Manufacturing Company*, 208 NLRB 213 (1974). Moreover, Lewis' remark, that those employees who want the Union should work out of the union hall and those who select Fred Lewis should stay, clearly conveyed a veiled threat of discharge—it was understood that union supporters should seek work elsewhere and that union support and continued employment were not compatible. Such veiled threats are violative of Section 8(a)(1) of the Act. *Rolligon Corporation*, 254 NLRB 22 (1981); *726 Seventeenth Inc., t/a Sans Souci Restaurant*, 254 NLRB 604, 605-606 (1978); *American Lumber Sales, Inc.*, 229 NLRB 414 (1977); *Cook United, Inc., d/b/a Cook's Discount Store*, 208 NLRB 134, 137 (1974). Also, in the context of the aforementioned violations, Lewis' statement to Schweizer that, if the problem was just health insurance or fringe benefits, they could have discussed the matter, must be considered to be an implied promise of benefits designed to induce employees to forego union support. Clearly, such is violative of Section 8(a)(1) of the Act. *El Rancho Market, supra; Swift Textiles, Inc., supra*. Finally, inasmuch as I have not credited Schweizer as to interrogation of the employees' union sympathies, I shall recommend that paragraph 6(b)(iv) of the complaint be dismissed.

[11] The Board has held that, in the absence of objective facts with which employees could reach a reasoned decision, it does not necessarily follow that union representation would increase an employer's labor costs disproportionately to a major customer's willingness to pay increased costs if passed on. There must be a showing that such a consequence is beyond the employer's control. *Crown Cork & Seal Company, Inc.*, 255 NLRB 14 (1981).

[12] In this regard, I credit the testimony of Lewis, Neyman, and Juarez and do not rely upon the testimony of Schweizer who, I believe, given the nature of Lewis' statements that afternoon and the nature of the employment decision which he was, at that moment, attempting to reach, was honestly mistaken and confused as to what Lewis was referring. Moreover, the answers of Lewis, Neyman, and Juarez, when asked their reactions to Schweizer's response, appear not to have been contrived but rather reasonable given the circumstances. Accordingly, I credit their testimony that Lewis' question referred to giving Horwitz a price list and conclude that no unlawful interrogation occurred. Finally, whatever the question, there is no dispute as to the responses.

Counsel for the General Counsel argues that, by his aforementioned conduct during the afternoon meeting, Fred Lewis created a pervasive atmosphere of coercion, encompassing threats of discharge and shutting down the business and other unlawful statements and that, by such, Respondent left union adherents Schweizer and Bartram no choice but to quit their employment—thereby effectuating constructive discharges in violation of Section 8(a)(1) and (3) of the Act. At the outset, it must be borne in mind that, "A constructive discharge is not a discharge at all but a quit which the Board treats as a discharge because of the circumstances which surround it." *ComGeneral Corporation*, 251 NLRB 653, 657 (1980). Normally, such situations arise in two factual contexts. In the first, with knowledge of its employees' participation in union or other protected concerted activities, an employer harasses the individual to the point that his job conditions become intolerable and, as a result, the employee quits. In such circumstances, a nexus between the working conditions and the individual's protected activities must be shown and the imposed burdens must be intended to cause an altering of the worker's working conditions. If both factors are present, a constructive discharge will be found. *Palby Lingerie, Inc. and Argus Lingerie Corp.*, 252 NLRB 176 (1980); *Maywood, Inc.*, 251 NLRB 779 (1980); *Lyman Steel Company*, 249 NLRB 296 (1980); *General Meats, Inc.*, 247 NLRB 1036 (1980); *Crystal Princeton Refining Company*, 222 NLRB 1068 (1978). In the second factual situation, an employer confronts an employee with the hobson's choice of either continuing to work or forgoing the rights guaranteed to him under Section 7 of the Act. In such a circumstance, his choice must be clear and unequivocal and not left to inference. *J. J. Security, Inc.*, 252 NLRB 1290 (1980); *Henry A. Young, d/b/a Columbia Engineers International*, 249 NLRB 1023 (1980); *Martin Arsham Sewing Co.*, 244 NLRB 918 (1979); *Superior Sprinkler, Inc., and William Augusto d/b/a William Augusto Fire Protection Services*, 227 NLRB 204 (1976); and *Marquis Elevator Company, Inc.*, 217 NLRB 461 (1975). Herein, not only did Lewis, during the afternoon meeting on August 28, repeatedly state his implacable hostility to dealing with the Union and the futility of employee support for it, but also he blatantly threatened to shut down the business because of the employees' union activities and, in effect, to terminate employees because they participated therein. It must be concluded, therefore, that it was not unreasonable for both Schweizer and Bartram to believe that each would no longer be welcome as an employee if he continued to support the Union. *Columbia Engineers, supra* at 1032. Faced with such a hobson's choice (working or giving up support for the Union), I believe both employees were forced to quit—and, thus, constructively discharged—by Lewis at the conclusion of the August 28 meeting in violation of Section 8(a)(1) and (3) of the Act.

Arguing that no constructive discharge occurred, counsel for Respondent relies heavily on the Board's Decision in *Masdon Industries, Inc.*, 212 NLRB 505 (1974). Therein, employees commenced a strike, resulting from dissatisfaction with their terms and conditions of employment. Two days later, the employer's president met with the strikers, during the course of which meeting he unlawfully threatened to close and move the plant. Thereupon, several strikers quit their employment rather than returning to work at the conclusion of the strike. Notwithstanding the unlawful threat of plant closure, the Baord found that the employees had not been constructively discharged. In so deciding, the Board placed significance on the fact that "Masdon did not in fact discharge or threaten to discharge the strikers. Nor were his remarks so interpreted by the striking employees." *Masdon, supra* at 506. Herein, of course, not only did Lewis threaten to close the business, but also he, in effect, threatened to terminate employees by inviting union supporters to work out of the union hall—thus causing them to believe support for the Union and continuing employment were incompatible. *Rolligon Corporation, supra*. Clearly, if such a blatant veiled threat had existed in *Masdon*, the Board undoubtedly would have found constructive discharges. Accordingly, Respondent's reliance upon that case is misplaced.[13]

Next, Respondent argues that both Schweizer and Bartram were economically motivated in deciding to quit their employment with Respondent. In this regard, Respondent correctly points out that both men were concerned with their wages and lack of fringe benefits. However, in so arguing, Respondent ignores the facts that both discriminatees had just 3 days before indicated their desire that the Union be their collective-bargaining representative; that during the August 28 afternoon meeting Lewis continually emphasized the futility of their activities; that, through union representation, they wished to earn higher wages and fringe benefits; that Lewis clearly indicated the incompatibility of union activities and continued employment; and that each unsuccessfully implored Lewis to, at least, try to work with the Union. In these circumstances it would be intellectually dishonest and simplistic to conclude that Schweizer's "spinning my wheels" comment did not, at least in significant part, allude to his and Schweizer's apparently fruitless union organizing attempt and that such was not a motivating factor in their respective decisions to quit.

The most troubling aspect of a finding of constructive discharges herein is that, subsequent to the conference room meeting at which Schweizer and Bartram announced that they would quit, Fred Lewis encountered both employees near a coffee area in the building and told each that he could have his job back. Both individuals rejected Lewis' offer. In *Columbia Engineers, supra* at 1031–32, the Board adopted the finding by an administrative law judge that the employer therein unconditionally asked the two constructively discharged employees to return to work and that, in such circumstances, backpay for the discriminatees was limited to the period from their discharges until the tendering of the reinstatement offers. Adopting this rationale, if Lewis' reinstatement offers were, in fact, unconditional, the earlier constructive discharges of Schweizer and Bartram would be, at most, technical violations of the Act. Moreover, it might

[13] Likewise *Dierks Forests, Inc. v. N.L.R.B.*, 385 F.2d 48 (8th Cir. 1967), is distinguishable inasmuch as I believe Lewis' conduct on August 28 established a pervasive atmosphere of coercion rather than consisting of mere isolated, unlawful statements.

legitimately be argued that Lewis' offers negated the existence of the aforementioned hobson's choice with which Schweizer and Bartram were confronted in the A & M Carpets conference room—thereby making their respective predicaments merely inferential and removing the possibility of constructive discharge. However, analysis of what occurred at the final, brief meeting between Lewis and the discriminatees convinces me that the former's offer was anything but unconditional. Thus, crediting the testimony of Schweizer, prior to making his offers, Lewis remarked that he was unhappy that Schweizer had not spoken to him "first on the matter," that he had given substantial personal assistance to Schweizer when the latter began working, and that he (Lewis) "was hurt by it." Based on the record as a whole, I believe the inference is warranted—and Schweizer so perceived—that Lewis was referring to the employees' union organizing activities. Such is crystal clear from Lewis' subsequent response to Bartram's plea that he, at least, try to work with the Union: ". . . no . . . . Absolutely not." Accordingly, Lewis' comments fully warrant the conclusion that, while he was, indeed, stating that Schweizer and Bartram could have their former jobs back, Lewis' previously rendered unlawful remarks were not withdrawn and remained the conditions under which the employees could remain with Respondent, making any further union activities incompatible with their reinstatement and continued employment. *J. J. Security, supra; Liberty Markets, Inc.*, 236 NLRB 1486, 1491 (1978). For the foregoing reasons and based on the record as a whole, I find that employees Schweizer and Bartram were constructively discharged in violation of Section 8(a)(1) and (3) of the Act. *Columbia Engineers; supra; Superior Sprinkler, supra.*

V. QUESTION OF BARGAINING ORDER

Counsel for the General Counsel argues that the impact of Respondent's conduct upon its employees has been so significant that a free and fair election to determine whether said employees would select the Union as their collective-bargaining representative would be impossible. He further argues that the severity of the previously discussed unfair labor practices warrants the entry of a remedial bargaining order against Respondent. In so asserting, counsel for the General Counsel contends that the Union achieved majority status on August 26, by which date five employees out of a total employee complement of nine had selected or designated the Union as their collective-bargaining representative. Contrary to this position, Respondent argues that the Union never achieved majority status herein, that Respondent committed no unfair labor practices herein, and that, if found, such unfair labor practices did not constitute such outrageous and pervasive unlawful conduct so as to warrant the issuance of an order requiring Respondent to bargain with the Union.

At the outset, the General Counsel does not contend, nor has the Board ever concluded, that a bargaining order is appropriate absent a finding of majority status. Thus, the threshold issue herein concerns whether, in fact, as alleged by counsel for the General Counsel, the Union achieved majority status on August 26. In support, he offered into evidence two documents, General Counsel's Exhibits 2(a) and (b), which bear the Union's letterhead and which contain the typed-in words, "We the undersigned of Fred Lewis Carpets, Inc. wish to be represented by [the Union], for purposes of collective bargaining." On Exhibit 2(a) beneath these words appear the signatures of employees Schweizer, Bartram, Juarez, and Neyman; beside each signature is the date, August 25, 1980. On Exhibit 2(b) beneath the typed-in words appears the signature of employee Larry Toney and beside it is the date, 8-26-80. Assuming *arguendo* the validity of the documents and the five signatures,[14] the bargaining unit must not have consisted of more than nine employees on August 26 to establish counsel for the General Counsel's assertion of union majority status. Inasmuch as I believe that the appropriate unit herein may have consisted of, at least, 10 employees, I conclude that counsel for the General Counsel has not met his burden of proof in this regard.

The complaint alleges, and Respondent admits in its answer, that the appropriate bargaining unit herein includes all carpet layers and installers employed by Respondent; excluding office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act. Fred Lewis testified, without contradiction, that Respondent also employs individuals who are classified as helpers. The record discloses that, while these employees earn less than the carpet layer/installers and do not receive vacations as do the latter employees, they work alongside the carpet layer/installers, performing much the same work. In establishing the number of employees in the unit as of August 26, counsel for the General Counsel relies solely on the testimony of employee Schweizer who identified the following individuals as comprising Respondent's employee complement on that date: himself, Bartram, Juarez, Neyman, Toney, Ron Giovanetti, Ken Schram, Henry Webber, and someone remembered only as Ted.[15] Asked if any other installers were employed on that date, Schweizer responded, "Not that I know of." From this inconclusive answer, counsel for the General Counsel argues that there were only nine employees in the bargaining unit.[16]

However, later in his testimony, while discussing the afternoon meeting in the A & M Carpets conference room on August 28, Schweizer identified a "Ron Jewett" as responding to a question by Fred Lewis. While Schweizer did not mention the name again, Lewis did.

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[14] There was a great deal of conflicting testimony concerning the typed-in words on both G. C. Exhs. 2(a) and (b) and what was said to the employees regarding the purpose for their signatures on the documents. Inasmuch as the thrust of this portion of my Decision involves the size of the bargaining unit rather than the validity of the signatures for purposes of establishing a majority showing, I need not resolve the conflicting testimony.

[15] Neither Schweizer nor Lewis could recall Ted's last name, however, both agreed that he was employed as of August 26. Lewis testified that Ted is no longer an employee but could not recall when he left Respondent's employ. However, he did recall that Ted was not a mere summer replacement.

[16] Presumably, counsel saw no need to offer Respondent's payroll records or any such similar documents to limit precisely the size of the unit.

Thus, recalled to testify regarding the helper classification he named Larry Toney and Ted as helpers.[17] Next, under questioning by counsel for the General Counsel, Lewis testified as follows:

> Q. Mr. Lewis, during the last couple of weeks of August, of all the names of your employees that have been mentioned in this proceeding, are Larry Toney and this kid Ted the only helpers you've had?
>
> A. I had another man working—Ron Jewett.
>
> Q. But of all the names that have been mentioned in the hearing, they're the only two that are helpers? Is that correct? The others were all installers?
>
> A. Yeah.

Apparently then, both Schweizer and Lewis have identified another employee, Ron Jewett. If he were employed by Respondent on August 26—and the record is patently unclear as to that fact—the bargaining unit would total 10 individuals, and the Union could not have achieved majority status on that date. In his post-hearing brief, counsel for the General Counsel speaks of Ron Jewett as being "a possible ambiguity" and apparently contends that both Schweizer and Lewis really meant Ron Giovanetti when they said Ron Jewett. Finally, referring to the aforementioned testimony, counsel for the General Counsel argues that Lewis corrected himself, identifying Toney and Ted as the only helpers. As to the first argument, it is inconceivable that both Schweizer and Lewis would make exactly the same mistake and mispronounce "Giovanetti" as "Jewett." Moreover, if not referring to Giovanetti, it would be an unlikely circumstance that both men used the same name to describe a nonexistent individual. Further, with regard to the above-quoted portion of the transcript, I note that the last question of counsel for the General Counsel is compound and that Lewis' "Yeah" answer may be responsive to either question. Also, even if in response to the question regarding helpers, the question itself is ambiguous—was it meant to be all inclusive as to employees in that classification or did counsel for the General Counsel mean just those helpers who had been the subject of testimony? Finally, I note that counsel for the General Counsel had ample opportunity to clarify any "ambiguity" with regard to Ron Jewett's employment status by either asking further questions of Lewis or calling his own witnesses. He did neither. In short, inasmuch as counsel for the General Counsel elicited only the testimony of discriminatee Schweizer with regard to the size of the bargaining unit, as Schweizer's testimony can hardly be said to have effectively limited the unit's size, and as no documentation was offered on the issue, the state of the record with regard to the size of the bargaining unit is, put bluntly, confused. Accordingly, assuming the validity of the 5 union authorization cards, as the overall employee complement on July 26 may well have been 10, counsel for the General Counsel has failed to meet his burden of proof that the Union had been designated by a majority of employees in the unit.[18]

[17] At the hearing and in his post-hearing brief, counsel for Respondent argued that helpers should be included in the bargaining unit. Counsel for the General Counsel argued at the hearing that inasmuch as the job classification was not specifically included in the bargaining unit, as set forth in the complaint, helpers should be excluded from the unit. However, in his post-hearing brief, while not specifically changing his position, counsel for the General Counsel concluded that Larry Toney and Ted, as helpers, performed the same duties and shared the same benefits and conceded that each should be included in the bargaining unit. In this regard, I note that, in conceding their inclusion, counsel apparently and inadvertently referred to Ted as "Ron." Inasmuch as I can find no reference to "an employee known only as Ron" in the record, presumably "Ron" was merely a typographical error. This must be so as Toney and Ted occupied the same job classification and it would make no sense for counsel to have conceded inclusion in the unit as to one and not the other.

VI. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. I have found that Respondent constructively discharged employees Schweizer and Bartram on August 28, 1980, in violation of Section 8(a)(1) and (3) of the Act. Accordingly, I shall recommend that Respondent be ordered to offer each employee immediate and full reinstatement to his former position of employment or, if said position no longer exists, to a substantially equivalent position, without prejudice to any rights and privileges to which he may be entitled. I shall further recommend that Respondent be ordered to make each employee whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of his termination, August 28, with backpay to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as described in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). Furthermore, it shall be recommended that Respondent be ordered to post a notice setting forth its obligations herein.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By causing the discharge of employees William Schweizer and Robert Bartram on August 28, 1980, based on their union or other protected concerted activities, Respondent engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act.
4. By threatening to close the business for an unspecified period of time; by constantly reminding employees that it would never go union; by threatening employees that it would become bankrupt as a consequence of employee union representation; by inviting union supporters to work elsewhere and reminding said individuals that continued employment and union activities are incompatible; and by impliedly promising benefits to employees in order to induce them to forgo union activities or sup-

[18] My conclusion herein renders it unnecessary to decide whether the severity and the quantum of unfair labor practices require the issuance of a bargaining order herein.

port, Respondent interfered with, coerced, and restrained its employees in the exercise of rights guaranteed by Section 7 of the Act and, thereby, engaged in unfair labor practices violative of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Unless specified above, Respondent engaged in no other unfair labor practices.

[Recommended Order omitted from publication.]